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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO.

BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, a Public Body Corporate, and F. B. WRIGHT, Superintendent of Schools of the NORTH LITTLE ROCK SCHOOL DISTRICT,

Petitioners,

VS.

ROBERT J. DAVIS AND LORENE JOSHUA (Intervenor),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the Constitution vest a district court with jurisdiction to continue its supervision of a school district's operations, including a continued imposition of mandatory cross-district busing and manipulation of school assignments to achieve racial balance, where the district has operated a court-approved racially unitary school system since 1972?

II. Is a district court at liberty to treat as a class action a suit filed in 1968 but never certified as such under Rule 23, F.R.Civ.P., in order to sustain its continued supervision of the operation of a school district, and to summarily substitute new nominal plaintiffs from time to time to perpetuate its jurisdiction in response to the claim of mootness for lack of any plaintiff with a stake in its outcome?

III Does the Constitution vest a district court with authority to order a school district to furnish bus transportation to a select group of black students, not provided to other similarly situated black or white students, on the ground that "public transportation is not always convenient or dependable"?

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BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, a Public Body Corporate, and F. B. WRIGHT, Superintendent of Schools of the NORTH LITTLE ROCK SCHOOL DISTRICT,

Petitioners,

VS.

ROBERT J. DAVIS AND LORENE JOSHUA (Intervenor),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Davis v. Board of Education of the North Little Rock, Arkansas, School*

District, et al., 635 F.2d 730 (8th Cir. 1980). The opinions of the United States District Court for the Eastern District of Arkansas of September 13, 1977 and June 29, 1979 are unreported and appear in the Appendix herein. The order denying petitioners' petition for rehearing is set forth in the Appendix, p. A-33.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1). The judgment of the United States Court of Appeals for the Eighth Circuit was entered December 24, 1980. The order of that court denying petitioners' petition for rehearing and suggestions for rehearing *en banc* was entered on January 29, 1981.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Section 2 of Article III of the Constitution of the United States. Also involved are Rules 23 and 24 of the Federal rules of Civil Procedure.

STATEMENT OF THE CASE

This school desegregation case was brought in 1968 pursuant the provisions of 42 U.S.C. §1983 seeking the desegregation of the North Little Rock School District. While never certified as a class action pursuant Rule 23, F.R.Civ.P., it was utilized as a vehicle by the district court, Hon. J. Smith Henley, to superintend desegregation of the

school district. * Under orders of the district court, ultimately reviewed and approved by the Court of Appeals with minor modifications (*Davis v. Board of Ed. of North Little Rock, Arkansas, School District*, 449 F.2d 500 (8th Cir. 1971), a racially unitary school system was achieved in September, 1972.

In 1975 petitioners applied to the district court, as they were required to do by the 1971 opinion of the Court of Appeals, for approval of proposed school construction. Another such application was made in 1976 at which time it was discovered that the court had not formally approved the 1975 application. Petitioners' motions of both 1975 and 1976 also sought dismissal of this litigation on grounds that this school system had been "unitary" since September, 1972, petitioners had fully discharged their constitutional obligations, and therefore there was no basis for continued jurisdiction of the district court.

On March 1, 1977 respondents filed a motion to cite petitioners and their counsel in contempt for proceeding with the 1975 construction without express approval of the district court. By this time the case had been reassigned to Judge Terry Shell because of Judge Henley's appointment to the Court of Appeals. Judge Shell scheduled a trial of all issues in the case for April 25, 1977.

Five days before the trial was scheduled to commence it became apparent at the taking of Mr. Davis' deposition that he had moved out of the North Little Rock School District with his family more than a year earlier. Cross-

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* This judicial supervision produced three published opinions. *Graves v. Board of Education of the No. Little Rock, Ark., Sch. Dist.*, 299 F.Supp. 843 (E.D. Ark. 1969); *Graves v. Board of Education of No. Little Rock, Ark., Sch. Dist.*, 302 F.Supp. 136 (E.D. Ark. 1969); *Davis v. Board of Education*, 328 F.Supp. 1197 (E.D. Ark. 1971).

motions were filed to dismiss the case as moot and to allow intervention of Mrs. Joshua who was alleged to be a mother of school children attending the schools of the district. At a pre-trial conference on April 22, 1977 Judge Shell granted the intervention over objection of petitioners, denied the motion to dismiss for mootness, and held that the contempt issue to be tried would be civil, not criminal. (A-10-11)

A three day trial ensued and on September 13, 1977 Judge Shell entered a Memorandum Opinion and Order (A. 14, 11) finding that there were deficiencies in procedures by which petitioners employed and assigned staff and faculty and directing a specific revision in that regard, that the individual complaints of students and parents pertaining to alleged academic, disciplinary and extra—curricular acitvity collectively "did not rise to the level of showing systematic discrimination by these defendants" so as to warrant relief in this school desegreation case, that the parties and the district court should share the "blame" for absence of formal record approval of the 1975 construction, and the motion for a contempt citation would therefore be denied.

As to the 1976 motion for approval of school construction, respondents' counsel withdrew part of his objections during the trial, withdrew the balance during argument on May 6, 1977, and Judge Shell approved the entire project by order entered May 12, 1977. It was petitioners' application in 1976 for approval of this construction that precipitated all of the 1977 proceedings including the September 13 Opinion and Order.

Petitioners filed a timely motion under Rules 52 and 29, F.E.Civ.P., that the district court amend its findings, conclusions and judgment to correct erroneous findings (and conclusions affected thereby), and to enter a final

appealable judgment. Other "housekeeping" pleadings and orders made necessary by the district court's continued supervision of the operation of the school district were filed, but Judge Shell took no further substantive action in the case prior to his death in June, 1978.

On June 29, 1979 Judge Elsijane T. Roy, to whom the case was assigned following Judge Shell's death, entered an order declining to consider the motion of petitioners seeking amendment of Judge Shell's September 13, 1977 Opinion and Order. Petitioners took a timely appeal.

Judge Roy did not purport to review Judge Shell's decision in light of the issues raised by petitioners' motion to amend it. Indeed, she could not have done so since the trial transcript was not typed until 1980 when it was ordered in connection with the appeal to the Court of Appeals. Thus while that court technically had before it an appeal from Judge Roy's order of June 29, 1979, the actual trial court decision under review was Judge Shell's September 13, 1977 Memorandum Opinion and Order and his rulings made incident to the April, 1977 trial.

The Court of Appeals affirmed the district court in all respects.

REASONS FOR GRANTING THE WRIT

The decisions of the courts below rest on the implicit assumption that the jurisdiction of a district court in a school desegregation case continues so long as any lawyer or person seeking to be made a party makes a racially-oriented complaint about the operation of the school system. This is contrary to the applicable decisions of this Court and in conflict with those of other courts of appeals. Moreover, the decision of the Court of Appeals so far

departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in that it entirely disregards petitioners' claim that the case is moot. In so doing it sanctioned the district court's denial, without expressed reasons, of petitioners' motion to dismiss on this ground.

I.

> I. Does the Constitution vest a district court with jurisdiction to continue its supervision of a school district's operations, including a continued imposition of a mandatory cross-district busing and manipulation of school assignments to achieve racial balance, where the district has operated a court-approved racially unitary school system since 1972?

A basic principle in our jurisprudence is that "Public policy dictates that there be an end of litigation;" *Baldwin v. Iowa State Traveling Men's Asso.*, 283 U.S. 522, 525 (1931). When the district courts should return the management of the schools to local authorities pursuant this principle remains an unsettled question.

This Court said in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955):

> "During this period of transition, the courts will retain jurisdiction of these cases."

Subsequent amplifications of that mandate have not provided the lower federal courts the guidance essential to fashion a uniform rule in this matter of critical national concern. In *Green v. School Board of New Kent County*, 391 U.S. 430, 439 (1968) it was said:

> "* * * the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."

A similar observation was made on the same day in *Raney v. Board of Education*, 391 U.S. 443, 449 (1968). But it was suggested in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.1, 23 (1971) that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated" there was no longer a constitutional violation to support continued jurisdiction in the district court. This concept was articulated in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) in these terms:

> "For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

In the case at bar the district court refused to dismiss although it had found as early as 1973 that "satisfactory racial integration of all twelve grades of the North Little Rock School System and of staff and faculty has been achieved"[1] and respondents had conceded in 1975 that this school district has been operating a "unitary system".[2] The grievances that the district court allowed respondents to inject in the 1977 trial did not challenge the desegregation plan which had long had that court's approval, but dealt with dissatisfaction of some individuals concerning the manner in which the operation of the plan affected them or others for whom they undertook to speak.

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[1] *Davis v. Board of Education*, 362 F.Supp. 730 (E.D. Ark. 1973).

[2] Motion of plaintiffs filed April 30, 1975.

This is in contrast to the well reasoned, and unappealed, decision in *United States v. Corinth Municipal Separate School District*, 414 F.Supp. 1336 (N.D. Miss. 1976) where the suit was dismissed notwithstanding claims of racial discrimination not directed toward the plan itself. The court viewed these claims as advanced "to serve as a vehicle by which the total operation of the public schools in that district may be held interminably subject to federal court jurisdiction." It concluded:

> "Here, we believe that, as a federal court, we have no further constitutional function to perform in this school system. The journey of the Corinth school district from *Brown I to Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), has been successfully completed. Since this is so, the words of Chief Justice Burger, speaking for a unanimous court, are appropriate:
>
> > 'At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in *Green (Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716) and *Alexander (Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19).' "

The conflicting views of these two district courts are reflected in those of the courts of appeals attempting to deal with this recurring issue. The Fifth Circuit adopted the rule that the district courts should retain jurisdiction for a "reasonable time" after finding a school system to be unitary in order to insure that the state imposed segregation has been completely removed. *Bradley v. Board of Public Instruction of Pinellas County, Florida*, 431 F.2d 1377 (5 Cir. 1970); *Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883 (5 Cir. 1970); *Mannings v.*

Board of Public Instruction of Hillsborough County, Florida, 427 F.2d 874 (5 Cir. 1970). Later decisions in that circuit hold that the district courts should relinquish jurisdiction three years after finding a system to be unitary if it has continued to meet that standard.[3]

Other circuits have held that jurisdiction should be retained until "disestablishment" of the dual school system has been achieved. *Morgan v. Kerrigan*, 523 F.2d 917 (1 Cir. 1975); *Evans v. Buchanan*, 582 F.2d 750 (3 Cir. 1978); *Sloan v. Tenth School District of Wilson County, Tennessee*, 433 F.2d 587 (6 Cir. 1970).

Still a different standard has been adopted in the Fourth and Eighth Circuits which require that jurisdiction be retained, apparently in perpetuity, to insure that the approved plan "is operated in a constitutionally permissible fashion". *Kelley v. Altheimer, Arkansas Public School District*, 378 F.2d 483 (8 Circ. 1967); *Haney v. County Board of Education*,. 429 F.2d 364 (8Cir. 1970); *Felder v. Harnett County Board of Education*, 409 F.2d 1070 (4 Cir. 1969).

The requirement of the Court of Appeals in the case at bar that the district court "retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated" falls in the latter class of decisions.

The difference in the foregoing rules is one of substance. One group of rules relinquishes control of the

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[3] *United States v. Texas*, 509 F.2d 192 (5 Cir. 1975); *United States v. Texas Education Agency*, 467 F.2d 848 (5 Cir. 1972); *Cisnero v. Corpus Christi Independent School District*, 467 F.2d 142 (5 Cir. 1972); *Calhoun v. Cook*, 451 F.2d 583 (5 Cir. 1971); *Youngblood v. Board of Public Instruction of Bay County, Florida*, 448 F.2d 770 (5 Cir. 1971); *Steele v. Board of Leon County, Florida*, 448 F.2d 767 (5 Cir. 1971); *Wright v. Board of Public Instruction of Alachua County, Florida*, 445 F.2d 1397 (5 Cir. 1971); *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5 Cir. 1971).

school system that has attained unitary status to the local authorities who are best equipped to deal with the day by day management of the schools including resolution in the first instance of questions that inevitably arise with legal implications.[4] The courts below have elected a rule that transfers to the federal judiciary supervision of the schools with no intelligible standard by which that intervention ever can be terminated.

II.

Is a district court at liberty to treat as a class action a suit filed in 1968 but never certified as such under Rule 23, F.R.Civ.P., in order to sustain its continued supervision of the operation of a school district, and to summarily substitute new nominal

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[1] Chief Justice Burger, joined in dissent by three other members of the Court, points out that necessity underlies such division of authority in *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972) at pp. 477-78:

> "This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extra-curricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed perferable in the abstract of a judge might well overlook and thus undermine these primary concerns.
>
> * * *
>
> When a plan devised by local authorities crosses the threshold of achieving actual desegregation, it is not for the district courts to overstep local perrogatives and insist on some other alternative. *Judicial power ends when a dual school system has ceased to exist.*" (emphasis added)

plaintiffs from time to time to perpetuate its jurisdiction in response to the claim of mootness for lack of any plaintiff with a stake in its outcome?

The case became moot and the district judge was so apprised before he undertook the three day trial in 1977. The suit was originally brought by Mr. Graves on behalf of his minor children attending petitioners' schools. Prior to reaching the Court of Appeals in 1971 Mr. Davis was substituted as plaintiff on behalf of his children attending these schools because the Graves children were no longer in the school system. On April 21, 1977 petitioners filed a motion to dismiss asserting that during the course of his deposition on the day before Mr. Davis disclosed that he had moved his residence out of the North Little Rock School District about January 1, 1976, that his minor children had withdrawn from the schools of the district about that date, and none of them thereafter had any connection with the school district.

Counsel for respondents sought to cure this jurisdictional defect by filing an application for intervention by Mrs. Joshua on behalf of her children on April 20, 1977. Over objection of petitioners Judge Shell ruled in a pre-trial conference on April 22, 1977, not attended by a court reporter, that he would grant this application and deny the motion to dismiss. In response to the request of petitioners' counsel he confirmed this ruling at the commencement of the trial on April 25, 1977. (A-9)

Even if the court's jurisdiction at the time had been unquestioned, the intervention clearly was untimely under Rule 24, F.R.Civ.P.[5] However, it was vigorously urged that

[5] This well-publicized suit had been pending since 1968 and Mrs. Joshua did not alleged lack of knowledge of its pendency to excuse delay in seeking intervention. *See NAACP v. New York*, 413 U.S. 345 (1973). Intervention was not intended as a vehicle to revive stale and abated litigation.

jurisdiction had abated both because of the District's unitary status for five years and because the case had become moot. The district court brushed aside both objections summarily. Thus Mrs. Joshua was permitted to keep afloat a non-certified class action simply on the assertion in her applicatin that she sought to represent "members of the class purportedly represented by Robert J. Davis, et al."[6]

Petitioners have never had the opportunity to test the right and capacity of any of the successive plaintiffs, including Mrs. Joshua, to prosecute this as a class action under Rule 23. She obviously had no standing to assert most of the issues presented at the trial. Neither she nor her children testified and therefore the record is silent as to which of their constitutional rights were claimed to have been violated. The constitutional requirement that jurisdiction of the federal courts is confined to a justiciable controversy *between the parties* is perverted by such an artifice.

The applicable standards were clear enough when the district court made its decisions in 1977. The intervention of the United States in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) before answer was filed is all that saved the case from being dismissed as clearly moot, and Justice Rehnquist's assessment of the status of the other plaintiffs is squarely applicable here:

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[6] The Court of Appeals took notice of the difficulty incident to the capacity of responsents to prosecute the suit by identifying the appellees before it in its published opinion as "Robert J. Davis in his own behalf and others similarly situated, appellees." The parties styled the appellees in their Briefs filed there, as we identify the respondents here, as "Robert J. Davis and Lorene Joshua (Intervenor)."

> "But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. *And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena Public Schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation.*" (emphasis added) 427 U.S. 424, 430.

The course adopted by the district court also disregarded the teachings of *Sosna v. Iowa*, 419 U.S. 393 (1975) where certification pursuant Rule 23 by the district court while the named plaintiff had standing(a status lost while the case was on appeal) saved the case from abating as moot, and *Indianapolis School Commissioners v. Jacobs*, 420 U.S. 128 (1975) where such a loss of standing resulted in vacating the judgments of the lower courts and dismissal of the complaint because, as in the case at bar, there was no such certification.

Petitioners invoke this Court's supervisory power to remedy disposition by the courts below of meritorious jurisdictional defenses by simply ignoring them. Since this is the only remedy afforded in our system for such error it is respectfully urged that fundamental considerations of justice and due process command the granting of review.

III.

> Does the Constitution vest a district court with authority to order a school district to furnish bus transportation to a select group of black students, not provided to other similarly situated black or white students, on the ground that "public transportation is not always convenient or dependable"?

Following the trial in 1977 the district court ordered petitioners to provide bus transportation to students residing in an area of the District referred to as "Dixie Addition." This was based on its finding, utterly unsupported by the evidence, that there was no public transportation available to these students and therefore they sustained an "undue transportational burden." The proof was that the District had never provided transportation to high school students and that there was public transportation available to the Dixie Addition students. The effect of the order was to require petitioners to commence providing bus transportation for about 200 high school students at substantial cost. Most, if not all, of this select group live within two miles of their assigned school. No other high school student, black or white, enjoys this privilege and hundreds live more distant from their schools.

The Court of Appeals recognized the unsupported finding of lack of public transportation by noting that the record did reflect that the "public transportation is not always convenient or dependable." 635 F.2d 730, 731.

The district court's order did not purport to rest on any demonstrated violation of the constitutional rights of the students affected. It represented only the judge's view of a desirable service to be provided at the District's expense. This Court has long been committed to the principle referred to by Chief Justice Burger in *Wright v. Council of City of Emporia, supra,* that decisions of this sort are entrusted to the local school authorities and not to the courts. It was so noted in *Epperson v. Arkansas,* 393 U.S. 97 (1968) at page 104:

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school

systems and which do not directly and sharply implicate basic constitutional values."

A more recent confirmation of the rule in the context of school authorities establishing non-discriminatory rules of eligibility for bus transportation is *Finkel v. New York City Board of Education*, 474 F.Supp. 468 (E.D. N.Y. 1979) affirmed 622 F.2d 573 (2 Cir. 1980).

The opinion of the district judge is silent as to a legal basis to support this busing order but the Court of Appeals reasoned that he "was concerned with equalizing the burden of integration as between the black and the white students in the school district, and believed that providing transportation to the predominantly black Dixie high school students was one way of accomplishing this goal." 635 F.2d 730, 731. Other ways to accomplish that worthy goal would be to provide financial grants or free meals to these students at school district expense, but the decision as to allocation of the District's limited resources between such frills and basic educational needs is vested in the school authorities. No violation of a constitutional right of the Dixie students was demonstrated and the district court therefore exceeded its power by this intervention.

It is not urged that this judicial intrusion into the management of the schools, standing alone, would warrant this Court's review. However, it does not stand alone but is intertwined with the other circumstances shown in this record in which the courts below have dealt severely and summarily with petitioners in a manner contrary to the applicable decisions of this Court and of the other courts of appeals. To permit the decisions below to stand unreviewed would surely hinder and delay the goal often referred to by this Court of returning management of the nation's public schools to the school authorities.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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April 28, 1981

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 79-1640

Robert J. Davis in his own behalf
and all others similarly situated,

Appellees,

v.

Appeal from the United
States District Court
for the Eastern District
of Arkansas.

Board of Education of the North
Little Rock, Arkansas, School
District, a public body corporate,
and F. B. Wright, Superintendent
of Schools of the North Little Rock School District,

Appellants.

Submitted: September 9, 1980

Filed: December 24, 1980

Before LAY, Chief Judge, GIBSON, Senior Circuit Judge,
and HEANEY, Circuit Judge.

HEANEY, Circuit Judge.

The North Little Rock Board of Education and its superintendent appeal from an order of the United States District Court for the Eastern District of Arkansas. The appellants ask this Court to hold that the district court erred in denying their motion to vacate all prior decrees and orders of the district court on the ground that the North Little Rock school system has been integrated for many years. The appellants also urge us to set aside the order of the district court requiring the school district to provide, at its own expense, transportation to high school students residing in the "Dixie Addition" of the city, and who attend North East High School. Finally, the appellants ask us to set aside the order of the district court requiring the school district to establish and implement a plan designed to fully integrate the faculty and staff of the school district, and to hold that the district court erred in awarding attorneys fees to counsel for the plaintiffs. We affirm the order of the district court.

On August 5, 1968, an action was initiated in the United States District Court for the Eastern District of Arkansas to integrate the North Little Rock School District. Between that date and April 30, 1975, the matter was before the district court on four occasions,[1] and once before this Court en banc.[2] The present appeal is from an order entered on June 29, 1979, by Judge Elsijane T. Roy, denying the defendants' motion to vacate all earlier orders and decrees

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[1] *Graves v. Board of Educ.*, 299 F.Supp. 843 (E.D. Ark. 1969); *Graves v. Board of Educ.*, 302 F.Supp. 136 (E.D. Ark. 1969); *Davis v. Board of Educ.*, 328 F.Supp. 1197 (E.D. Ark. 1971), *modified on appeal*, 449 F.2d 500 (8th Cir. 1971) (en banc); *Davis v. Board of Educ.*, 362 F.Supp. 730 (E.D. Ark. 1973).

[2] *Davis v. Board of Educ.*, 449 F.2d 500 (8th Cir. 1971) (en banc).

issued by the late Judge Terry L. Shell. Judge Roy's order essentially affirms a September 13, 1977, order of Judge Shell, who died while a petition for reconsideration of his orders was under consideration. We look to Judge Shell's opinion and order to determine the factual basis of this appeal. That opinion reveals that the plaintiffs filed a motion with the district court on April 30, 1975, requesting additional relief with respect to pupil transportation, faculty and staff assignments and extracurricular student activities. They also moved the district court to issue a contempt citation against the school board members and the defendants' counsel for failure to comply with the 1971 mandate of this Court. *Davis v. Board of Educ. of North Little Rock*, 499 F.2d 500 (8th Cir. 1971) (en banc). A three-day hearing on these issues was held in April, 1977.

I.

TRANSPORTATION

At the 1977 hearing before Judge Shell, the plaintiffs introduced evidence that tended to show that the majority of black students who lived in the Dixie Addition of North Little Rock were required to attend high school at North East High School, located in the northeast corner of North Little Rock, Arkansas. The district court determined that there was "no reasonable safe pedestrian pathway from 'Dixie' to North East High School," and that the transportation plan in existence "imposes an undue transportational burden upon those black students who reside in the Dixie area." Judge Shell ordered the school district to provide transportation, at its own expense, to all high school students who reside in "Dixie" and are required to attend North East High School. He left it to the parties to work out the details regarding the number of buses required and the geographic point from which the buses would depart and return.

The record fully supports the district court's findings and conclusions. There is abundant testimony in the record indicating that students living in the Dixie Addition are required to cross a major interstate highway at the busiest time of day to reach North East High School; that there is no safe and convenient way to cross that highway; that students are required to walk on the streets through much of the route between "Dixie" and the high school -- a distance of about two miles. The record also reveals that many of the families that live in the Dixie Addition are low income families who are unable to afford the cost of public transportation to and from school; it further reflects the fact that public transportation is not always convenient or dependable. We also note that the district court was concerned with equalizing the burden of integration as between the black and white students in the school district, and believed that providing transportation to the predominantly black Dixie high school students was one way of accomplishing this goal. We agree that the goal is a legitimate one and that it will be achieved in part by the district court's order. See *Clark v. Board of Educ.*, 499 F.2d 493 (8th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 936 (1972).

II.

FACULTY AND STAFF

In *Davis v. Board of Educ.*, 449 F.2d 500 (8th Cir. 1971) (en banc), we required the Board of Education to establish and implement objective and nondiscriminatory standards respecting the employment, assignment and dismissal of teachers. We noted that nondiscriminatory subjective factors could be considered in the decision making process, but that they should be given little weight because of the past history of racial discrimination in the school district. Judge Shell determined that this Court's instruction had

not been followed by the Board; he found that the Board's policy continued to be an informal one, which only purported to select the most qualified applicants. He stated:

> [T]he effect of this informal employment policy has been maintenance of a body of faculty and staff which is top-heavy in percentages of whites in supervisory and administrative positions, secondary school teaching positions, and such specialty positions as librarians, guidance counselors, and head athletic coaches. On the other hand, the percentage of blacks who maintain positions as elementary school teachers and service workers is high.

Davis v. Board of Educ., No. LR-68-C-151 (E.D.Ark. Sept. 13, 1977).

Judge Shell noted that although twenty-six percent of the students and twenty percent of the faculty were black, only one of the twenty-three administrators and supervisors in the central office was black; that only five of the twenty-six school principals were black (four of the five being assigned to elementary schools); that only two of the fourteen guidance counselors were black; and that only two of the librarians or audiovisual staff assistants were black. He held that the Board of Education was under a continuing mandate from this Court to implement objective nondiscriminatory standards with respect to the assignment of faculty and staff, and that it would be required to take the actions set forth below to comply with that mandate:

> (1) That the defendants proceed forthwith to establish and implement a system that will ensure that complete records are kept of positions that become available on the faculty and staff, the number of persons who applied for the positions and their respective qualifications, the name of the person who

offered the position, and the means utilized for notification of the opening;

(2) That the defendants shall establish a procedure which will provide reasonable notice to the community and the faculty and staff themselves that employment is available;

(3) That the defendants in good faith shall use reasonable means to recruit qualified black applicants for available positions where the percentage of blacks in similar positions in their employ is below the percentage of black students enrollment;

(4) Likewise, the defendants in good faith shall use reasonable efforts to recruit non-black applicants where the percentage of blacks who presently fill similar positions is greater than the percent of black student enrollment. The Court does not intend to hold the school district to exactness with regard to the percentages mentioned above. Substantial compliance is what the Court seeks in order to assume that the faculty and staff of the school district are free of racial identifiability at every level. The defendants shall report to the Court within ninety days of the date of entry of this memorandum opinion on their progress in this area.

(5) That the defendants shall review the criteria for employment in each employment position it maintains and revise same in accordance with the substantive provisions of 42 U.S.C. §2000(e) *et seq.*, to ensure that each criterion is job related within the meaning of "bona fide occupational qualifications."

Davis v. Board of Educ., supra, No. LR-68-C-151 (E.D. Ark. Sept. 13, 1977).

We believe that Judge Shell's findings are more than adequately supported by the record and that his order is an appropriate one which hopefully will ensure a nonracially

identifiable faculty and staff at every level of the school system.

We also note that the record is replete with evidence that black students do not participate in proportion to their numbers in certain extracurricular activities including cheerleading, pep club, band, drill team and future homemakers. The record also shows that black students are suspended more frequently than white students and that they tend to be numerically overrepresented in the special education classes for slow learners.

There is a serious dispute in the record regarding the reasons for lack of participation in the listed extracurricular activities, for the more frequent suspensions and overrepresentation in the classes for slow learners. The plaintiffs introduced evidence tending to show that the school district and its administrators were responsible, and that these conditions resulted because of the discriminatory policies of the Board, the school administrators and the faculty. The Board introduced evidence tending to show that nonracial factors were responsible for the conditions. Judge Shell did not explicitly decide these issues. He rather stated that he was convinced that the established racial disparities in these areas did not rise to the level of systematical discrimination, and that the individual incidents of discrimination were not within the scope of the case before him. While we are not prepared to hold at this time that the district court's rulings in these regards are clearly erroneous or based on an erroneous view of the law, we are satisfied from the record that the situation can be dramatically improved if this Court's earlier mandate, requiring a nonracially identifiable faculty and staff at *every level* of the school system, is promptly implemented. Judge Shell's order, which we affirm today, imposes that requirement on the Board of Education.

III.

ATTORNEYS FEES

In view of our holding that the district court acted properly in ordering the transportation of high school students living in the Dixie Addition to North East High School, and in view of his findings that the faculty and the staff of the school district had not been integrated as required by this Court's order of 1971, Judge Roy did not err in refusing to vacate Judge Shell's prior decrees and orders on the ground that the defendants were operating a unitary school system. More remains to be accomplished before it can be said that the North Little Rock School District is fully integrated.

In light of the fact that we have affirmed the substantive decisions of the district court, we also affirm its decision to award attorneys fees to plaintiffs' counsel for services rendered in the district court action. The fees shall be computed in accordance with Judge Roy's order of June 29, 1979. Counsel for appellee is directed to submit an affidavit to this Court within ten days of the issuance of this Court's mandate in support of an allowance of attorneys fees for this appeal.

Judge Roy's order denying the defendants' motion to reconsider Judge Shell's earlier orders and decrees is affirmed.

We remand this matter to the district court with directions to it to take action consistent with this opinion and to retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

ROBERT J. DAVIS, et al,

Plaintiffs,

V. CASE NO. LR-68-C-151

BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, et al,

Defendants.

BE IT REMEMBERED, that the above-entitled matter came on for hearing before the Honorable TERRY L. SHELL, United States District Judge, in the United States District Courtroom, U.S. Post Office & Court House, Little Rock, Arkansas, commencing on Monday, April 25, 1977, at 9:30 o'clock a.m.

APPEARANCES:

On behalf of the plaintiffs:

WALKER, KAPLAN & MAYS, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201
By: Mr. John Walker and Mr. Philip Kaplan

On behalf of the defendants:

FRIDAY, ELDREDGE AND CLARK
2000 First National Building
Little Rock, Arkansas 72201

By: Mr. Robert V. Light and Mr. G. Ross Smith

PROCEEDINGS

THE COURT: Whenever you are ready to commence, you may make whatever opening statement you care to.

MR. LIGHT: Your Honor, before we proceed with that, the Court has indicated in three off-the-record conferences with counsel over the past several weeks a number of rulings it intends to make, and I would respectfully suggest it might be well to have those rulings made of record now so that the parties will know the ground rules in proceeding in this matter.

THE COURT: You have reference to which particular orders? Would it not suit you just as well -- I think we will be familiar when we get into that area what the Court's ruling is, and we will reduce it to writing and have a written ruling on each of the matters.

First, at this time, we indicate the burden of proof is on the plaintiff. We have allowed the intervention. We have overruled the motion of the defendant to dismiss on the merits. I have ruled that it is civil contempt that we will be trying and we will try it with the issues in the case.

Is there another ruling that you can think of, either of you, that would affect the trial today?

MR. WALKER: Plaintiff knows of no ruling, Your Honor.

MR. LIGHT: Your Honor, I don't think the Court has identified or made a ruling on what ruling it is that the defendants and their counsel are deemed to have defied. They are a little mystified about that.

THE COURT: Certainly, the Court would not go beyond the scope of the petition, because contrary to most contempts that originate from the Court, this is a petition by the defendant -- I mean by the plaintiff -- they are moving for the contempt. They have alleged certain matters in their petition. * * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Robert J. Davis, et al. Plaintiffs

v.

No. LR-68-C-151

Board of Education of the
North Little Rock, Arkansas
School District, et al. Defendants

ORDER

Pursuant to the Court's Memorandum Opinion this day filed herein, it is CONSIDERED, ORDERED, ADJUDGED and DECREED that bus transportation at the expense of the North Little Rock, Arkansas Special School District be provided as soon as possible for all students, regardless of race, who reside in the Dixie Addition area and are required

to attend either Northeast High School or Lakewood Junior High School in North Little Rock, Arkansas. Counsel for both parties are directed to report to this Court, no later than September 30, 1977, the proposed arrangements as to the number of buses, the location of arrival and departure of the buses, and other details that the parties shall have settled by agreement.

IT IS FURTHER ORDERED that in the area of employment practices:

(1) The defendants proceed forthwith to establish and implement a system that will ensure that complete records are kept of positions that become available on the faculty and staff, the number of persons who applied for the positions and their respective qualifications, the name of the person who was offered the position, and the means utilized for notification of the opening.

(2) The defendants shall establish a procedure which will provide reasonable notice to the community and the faculty and staff themselves that employment is available;

(3) The defendants in good faith shall use reasonable means to recruit qualified black applicants for available positions where the percentage of blacks in similar positions in their employ is below the percentage of black student enrollment;

(4) Likewise, the defendants in good faith shall use reasonable effort to recruit non-black applicants where the percentage of blacks who presently fill similar positions is greater than the percent of black student enrollment. The Court does not intend to hold the school district to exactness with regard to the percentages mentioned above. Substantial compliance is what the Court seeks in order to assume that the faculty and staff of the school district is free of racial

identifiability at every level. The defendants shall report to the Court within ninety days of the date of entry of this memorandum opinion on their progress in this area.

(5) The defendants shall review the criteria for employment in each employment position it maintains and revise same in accordance with the substantive provisions of 42 U.S.C. §2000(e) *et seq.*, to ensure that each criterion is job related within the meaning of "bona fide occupational qualifications."

IT IS FURTHER ORDERED that plaintiffs' motion that defendants and their counsel, Mr. Robert V. Light, be held in contempt of this Court on grounds that defendants failed to observe the rule of decision of the Eighth Circuit Court of Appeals in *Davis v. North Little Rock School District*, 328 F.Supp. 1197 (E.D. Ark. 1971), *modified*, 449 F.2d 500 (8th Cir. 1971), is hereby denied.

IT IS FURTHER ORDERED that a reasonable attorney's fee will be awarded to plaintiffs in this case. Counsel for plaintiffs is directed to file within thirty (30) days a detailed statement of fees.

The Court retains jurisdiction of this cause for all appropriate purposes.

IT IS SO ORDERED. Dated this 13 day of September, 1977.

Terry L. Shell
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Robert J. Davis, et al. Plaintiffs

v.

No. LR-68-C-151

Board of Education of the
North Little Rock, Arkansas
School District, et al. Defendants

MEMORANDUM OPINION

This school desegregation case was commenced in 1968 by black patrons of the North Little Rock Special School District. All prior proceedings in this cause were handled by the Honorable J. Smith Henley, sitting as Chief Judge of the Eastern District of Arkansas prior to his elevation to the Eighth Circuit Court of Appeals. During Judge Henley's tenure in this district this case produced four published opinions of the District Court and one published opinion of the Court of Appeals.[1] By order of the appellate court this Court has retained jurisdiction to oversee implementation of the approved desegregation plan. This cause is now before the Court on plaintiffs' motions: (1) seeking additional relief with regard to pupil transportation, faculty and staff assignments, and curricular and extra-curricular student activities and (2) seeking a citation of contempt of Court against the school board members and defendants'

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[1] *Graves v. Board of Education*, 299 F.Supp. 843 (E.D. Ark. 1969); *Graves v. Board of Education*, 302 F.Supp. 136 (E.D. Ark. 1969); *Davis v. Board of Education*, 328 F. Supp. 1197 (E.D. Ark. 1971); modified on appeal, 449 F.2d 500 (8th Cir. 1971); *Davis v. Board of Education*, 362 F.Supp. 730 (E.D. Ark. 1973).

counsel for failure to comply with the mandate of the Court of Appeals entered in 1971.

A hearing on the above issues commenced on April 24, 1977 and lasted three days. The Court entertained oral argument on May 6, 1977. Many issues in addition to those mentioned above were resolved either during the course of the hearing or at the conclusion of same.[2] The Court now undertakes resolution of the issues remaining in a *seriation* fashion.

I. PLAINTIFFS' MOTION FOR FURTHER RELIEF.

As previously stated, plaintiffs' motion seeking additional relief raises three issues. Specifically, these issues are: (1) Whether the present pupil transportation plan imposes a disproportionate burden upon black students; (2) Whether the school district has developed and utilized objective nondiscriminatory criteria with regard to the employment and assignment of individual faculty and staff; and (3) Whether the school district has systematically discriminated against black students since the adoption of the desegregation plan in the areas of student assignments to special education classes and honors classes, imposition of disciplinary measures, and participation in extra-curricular activities such as cheerleading, pep club, drill team, and various career-oriented clubs. These issues will be considered separately in the order in which they have been listed.

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[2] On April 22, 1977 the Court denied plaintiffs' motion to cite defendants and counsel with criminal contempt of Court. On the same day the Court granted plaintiffs' application for substitution of parties plaintiff and denied defendants' motion to dismiss filed April 21, 1977. On May 12, 1977 the Court granted plaintiffs' motion for approval of additional construction filed October 4, 1976 on the representation by plaintiffs that their objections thereto were withdrawn.

Pupil Transportation

In the school year 1976-1977 the North Little Rock Special School District has the responsibility of providing an education for 10,907 students in grades one through twelve. The black student population accounted for twenty-six percent of the total figure. Since 1972 the school district has attempted to maintain a racial balance in each school by assignment of pupils to schools pursuant to the "Storm Plan."[3]

As adopted, the Storm Plan provides transportation at district expense for students in grades one through nine. No student who lives less than two miles from the school to which he or she is assigned is provided transportation. No students in grades ten through twelve are provided transportation.

Plaintiffs have narrowed their recent challenge to the Storm Plan to the provisions relating to transportation of secondary students. Specifically, plaintiffs contend that the application of the plan on the secondary level has placed a disproportionate burden on those black students who reside in a southeast section of the town known as the Dixie Addition who must travel to Northeast High School and Lakewood Junior High. Plaintiffs acknowledge that most, if not all, of the Dixie Addition is within two miles of the campus of these two schools. However, plaintiffs contend that the intersection of two interstate highways separating the Dixie Addition from the rest of North Little Rock makes

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[3] The plan derives its name from a member of the Board of Education, Mr. Fred Storm, who suggested it. Prior to 1969 the district adhered to a "freedom of choice" plan. A detailed history of the integration of North Little Rock schools leading up to the adoption of the "Storm Plan" is provided in the memorandum opinions of Judge Henley. See footnote 1, *supra*.

the walk from this area to these campuses so treacherous that separate consideration should be given to the transportation needs of the students who reside there.

A brief explanation of the operation of the Storm Plan at the secondary level is required. Utilizing a very simplified approach, the city of North Little Rock can be graphically viewed as a rectangle. Along the southern border of the Arkansas River runs in an easterly direction, separating the city of Little Rock from North Little Rock. Interstate Highway 40 bisects the rectangle, running along an east-west line roughly parallel to the Arkansas River. Interstate Highway 30 intersects, but does not cross, Interstate Highway 40 at a point which, for the purposes of this description, can be considered the geographical center of the city. Interstate 30 leads south from Interstate 40 and crosses the Arkansas River into Little Rock. Most of the black population of North Little Rock live in the southern half of the city between the Arkansas River and I-40. The Dixie Addition is located to the south of Interstate 40 and to the east of Interstate 30.

The geographical attendance zones for the two high schools maintained by the district are defined by a north-south line bisecting the city into eastern and western divisions. Interstate 30 serves as the divider between these two zones in the southern half of the city. Ole Main High School (formerly known as North Little Rock High) is centrally located south of I-40 and west of I-30, a short distance from their intersection. Northeast High School, as the name implies, is located north of I-40 and east of I-30. It is not considered centrally located. Lakewood Junior High shares a campus with Northeast High School.

Prior to 1969 the school district maintained the Scipio A. Jones High School in the Dixie Addition. Jones High was

attended by black students only. With the advent of the Storm Plan, Jones was converted to a school for all seventh grade students in the district and renamed Central Junior High, commonly referred to as the seventh grade center.

In their motion for additional relief plaintiffs request that the school district either reopen Jones High School for grades ten through twelve or provide transportation at district expense for those students living in the Dixie Addition area who are assigned to attend either Northeast High School or Lakewood Junior High. In support of their transportation request plaintiffs have shown that most of the black population of North Little Rock live in the southern half of the city. Plaintiffs have shown that those students who live in the western division of the high school geographic zones attend a centrally located school, whereas those who live in the eastern division attend a school located in the northeast corner of the city. Plaintiffs have shown that there is no reasonably safe pedestrian pathway from the Dixie Addition area to Northeast High School and Lakewood Junior High.

The testimony of Mr. George Miller, Superintendent of the North Little Rock Special School District, indicated that at the time of the adoption of the Storm Plan, the district recognized that transportation to Northeast and Lakewood for students residing in the Dixie Addition was a problem. In the early stages of the plan the school district arranged for Central Arkansas Transit, the municipal bus company, to run public buses at student expense to and from Northeast and Lakewood at the beginning and close of the school day. This service was discontinued shortly after its inception at the insistence of the bus company on grounds that the students had damaged the buses. Since discontinuance of this service the school district has made no additional effort to provide a means of transportation for students from the Dixie area.

The Court is convinced that the plaintiffs have met their burden of proof in support of their contention that the Storm Plan, as applied, imposes an undue transportational burden upon those black students who reside in the Dixie area and are assigned to attend either Northeast High School or Lakewood Junior High. The Court will, therefore, order that bus transportation at the expense of the school district be provided as soon as possible for those students who reside in the Dixie Addition area and are required to attend either Northeast or Lakewood. The relief shall extend not only to black students but all students similarly situated. The Court is inclined to provide that the buses shall depart from and return to the Central Junior High campus. However, the Court will leave the details of how many buses are needed and where the buses will depart and return as matters to be settled by agreement between the parties. Counsel shall report to the Court on their progress to this end no later than September 30, 1977.

Faculty and Staff

Scant attention has been given to the subject of faculty and staff unitization throughout the nine-year history of this case. In 1969 defendants sought court approval of a faculty and staff desegregation plan which constituted only a pledge that the district would "refrain from racial discrimination in hiring, compensating, promotion, demoting, and discharging professional employees." *Graves, supra*, 299 F.Supp. at 848. Judge Henley found that acceptance of this plan would result in "an essentially segregated faculty with only token desegregation." *Ibid*, 848. Judge Henley, therefore, rejected defendants' plan and ordered complete faculty and staff integration forthwith. *Id*, at 849. In 1971 Judge Henley found that the faculty and staffs were "essentially desegregated" and indicated a reluctance to deal with the problem more specifically until

the underlying problems of student assignments were solved. On appeal, the appellate court characterized Judge Henley's actions as indicative of "a present unwillingness to require the school district to use objective nondiscriminatory standards in the reassignment of faculty and staff." *Davis, supra*, 449 F.2d at 502. The appellate court directed Judge Henley to modify his decree to require the school district to establish and implement standards with respect to the reassignment of faculty and staff. Due to judicial oversight, the 1971 district court decree was not modified in accordance with the directives of the appellate court until April 24, 1977, the first day of these hearings.

The policy presently in effect governing employment practices of the district is essentially the same as that proposed to Judge Henley in 1969. It is informal to say the least. With regard to hiring, it was the testimony of Superintendent Miller that the school district simply hires the person most qualified for the job. Until recent years, the principal of each school was charged with the responsibility of selecting teaching personnel. The office of the Superintendent selected supervisory and administrative personnel. At present, all personnel are hired, assigned, transferred, or fired through the office of the Superintendent, subject to the approval of the Board of Education. Mr. Miller testified that recruitment of personnel was not a customary practice. When a faculty or staff vacancy occurs, Mr. Miller testified that he notifies the Classroom Teachers Association of the vacancy (pursuant to an agreement struck between the district and the association), then reviews the applications on hand and selects the most qualified applicant. Mr. Miller denies that race is a factor in any personnel decision.

The Court finds that the effect of this informal employment policy has been maintenance of a body of

faculty and staff which is top-heavy in percentages of whites in supervisory and administrative positions, secondary school teaching positions, and such specialty positions as librarians, guidance counselors, and head athletic coaches. On the other hand, the percentage of blacks who maintain positions as elementary school teachers and service workers is high.

As stated previously, the black student population accounted for twenty-six percent of the total enrollment of students during the 1976-77 school year. Black faculty and staff, however, account for only twenty percent of the total faculty and staff. In the central office there are twenty-three administrative and supervisory positions if the five special education supervisors are included in this figure. Mr. Andrew Power, Assistant Superintendent in charge of Educational Projects and Student Affairs, is the only black in the administrative office. There are twenty-six school principals employed by the school district. Five of the principals employed are black. Four of the five black principals are assigned to elementary schools, one is assigned to a junior high school. Black elementary school teachers account for thirty-two percent of the elementary teaching staff. Black secondary teachers, however, account for only fourteen percent of the total secondary teaching staff. There are fourteen guidance counselor positions maintained by the school district in grades one through twelve. There are only two black guidance counselors, one assigned to junior high and the other assigned to elementary school. Twenty-eight persons serve as either librarians or audio-visual staff assistants. Only two blacks hold these positions, one of which serves as an assistant librarian at a senior high. Thirty-five percent of the service workers' positions are filled by blacks.

This Court finds, as Judge Henley did in 1969, that it is patently insufficient for the defendants to content themselves with mere expressions of abstract good intentions with regard to their employment practices. On April 24, 1977, pursuant to the directives of the Eighth Circuit Court of Appeals, this Court ordered defendants to implement objective nondiscriminatory standards with regard to the assignment of faculty and staff. The Court does not intend to disburb its previous order, and will hold the defendants to it. Moreover, on the basis of the evidence presented concerning the present makeup of the faculty and staff, the Court feels compelled to set forth for guidance purposes a few of the minimum standards to which defendants should adhere in this area. As the appellate court stated in *Clark v. Board of Education of the Little Rock School District*, 449 F.2d 493, 497 (8th Cir. 1971), "subjective standards carry little weight in meeting the board's burden to prove clearly and convincingly that it is not discriminating where there has been a history of racial segregation since *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)."

Therefore, in the area of employment practices the Court will order the following:

(1) That the defendants proceed forthwith to establish and implement a system that will ensure that complete records are kept of positions that become available on the faculty and staff, the number of persons who applied for the positions and their respective qualifications, the name of the person who was offered the position, and the means utilized for notification of the opening;

(2) That the defendants shall establish a procedure which will provide reasonable notice to the community and the faculty and staff themselves that employment is available;

(3) That the defendants in good faith shall use reasonable means to recruit qualified black applicants for available positions where the percentage of blacks in similar positions in their employ is below the percentage of black student enrollment;

(4) Likewise, the defendants in good faith shall use reasonable effort to recruit non-black applicants where the percentage of blacks who presently fill similar positions is greater than the percent of black student enrollment. The Court does not intend to hold the school district to exactness with regard to the percentages mentioned above. Substantial compliance is what the Court seeks in order to assume that the faculty and staff of the school district are free of racial identifiability at every level. The defendants shall report to the Court within ninety days of the date of entry of this memorandum opinion on their progress in this area.

(5) That the defendants shall review the criteria for employment in each employment position it maintains and revise same in accordance with the substantive provisions of 42 U.S.C. §2000(e) *et seq.*, to ensure that each criterion is job related within the meaning of "bona fide occupational qualifications."

Plaintiffs have sought individual relief in terms of reassignment and back pay for certain past and present members of the faculty. The Court is of the opinion that these hearings were not an appropriate forum for presentation of individual claims. The Court will make no findings on these claims. The Court is inclined to believe that these matters should be taken up in separate lawsuits. If plaintiffs intend to persist in the presentation of these claims in this action, then plaintiffs should appeal to the Court with suggestions for an appropriate procedure for handling same.

Student Activities

Plaintiffs contend that defendants have systematically discriminated against black students in the areas of student assignments to special education classes and honors classes, imposition of disciplinary measures, and participation in extra-curricular activities such as cheerleading, pep club, drill team and various career-oriented clubs.

These contentions may be dealt with in short order. The Court is convinced that plaintiffs' proof in this area did not rise to the level of showing systematic discrimination by these defendants. Plaintiffs did introduce evidence concerning regretable incidents stemming from racial prejudice, some of which quite possibly are of constitutional import. However, these incidents, in the aggregate, are without the scope of a desegregation suit against a school district.

At any rate, some of the matters about which plaintiffs complain have been resolved or are in the process of resolution. Plaintiffs complain about the disproportionate number of blacks who are disciplined by school authorities. Suggested rules governing the imposition of discipline in the North Little Rock schools, promulgation of which stemmed from a separate lawsuit, are presently awaiting Court approval by the Honorable G. Thomas Eisele, Chief Judge, Eastern District of Arkansas. Plaintiffs complain that the lack of transportation for students from Dixie who travel to Northeast resulted in an unusual number of suspensions for blacks for tardiness. This should be resolved by this Court's opinion. Racial identifiability of the staff of school disciplinarians should be resolved by this Court's opinion. In addition, the new rules governing the procedures for assignment of students to special education

promulgated in March, 1977, by the District should help to guarantee that the interests of the student and the rights of the parents will be guarded in future assignments to special education classes.

II. CONTEMPT

Plaintiffs have asked this Court to hold defendants and their counsel, Mr. Robert V. Light, in contempt of Court on grounds that defendants failed to observe the rule of decision of the Eighth Circuit Court of Appeals in *Davis v. North Little Rock School District, supra.* The appellate decision in *Davis* directed the district court to modify its previous decree to provide that no additional school facilities were to be constructed by the District without the express permission of the district court. The appellate decision further provided that, "We require the board to submit to the District Court every sixty days a report of its progress toward implementation of the [Storm Plan]." *Davis, supra,* at 502.

Plaintiffs contend that defendants and counsel should be held in contempt of this Court for failure to comply with the reporting requirement of the Court of Appeals and the rule of decision of the appellate court with regard to additional construction. It is clear that no express permission of the district court was obtained prior to the school district's undertaking of extensive construction in 1975. It is also clear that the defendants filed only one report with Judge Henley as required by the appellate court, and that nothing in the court file indicates that Judge Henley relieved the defendants of the obligation placed upon them by the Court of Appeals. Defendants point out that Judge Henley never modified his decree in accordance with the directives of the appellate court. They argue that contempt, if it exists, would be a matter for the appellate

court to decide. Furthermore, defendants contend that informal agreements were struck between both parties and Judge Henley relieving defendants of the reporting requirement and permitting the additional construction.

This Court has decided that nothing can be served by holding the defendants and defense counsel in contempt. The circumstances surrounding the events which give rise to plaintiffs' contempt motion are viewed by this Court as regrettable in all respects. All parties, the district court included, share the blame, although not to the same degree. In this Court's view, the defendants had an affirmative duty to comply with the decision of the appellate court despite the fact that the appellate court orders were routed to them indirectly. If express permission for additional construction was contemplated defendants should have seen that the record adequately reflected either acquiescence or permission. Plaintiffs, on the other hand, should have been more diligent in voicing their objections to the construction. Some of the blame rests with them. Lastly, blame must be shared by the district court. This cause has been a protracted lawsuit. In view of all that has taken place it is regrettable that these events arose at a time when Judge Henley was in transition to the Court of Appeals. This Court is confident that had this not been the case these incidents would not have arisen. The Court has previously ruled that contempt, if any, would be civil in nature. Civil contempt, of course, has a remedial purpose. It is the opinion of the Court that nothing would be remedied by a contempt citation. Plaintiffs' motion will therefore be denied.

III. ATTORNEY'S FEES.

A reasonable attorney's fee will be awarded to plaintiffs in this case. Counsel for plaintiffs is directed to file within thirty days a detailed statement of fees.

An appropriate order in accordance with the provisions of this Memorandum Opinion will be entered.

Dated this 13 day of September, 1977.

/s/ Terry L. Shell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Robert J. Davis, et al. Plaintiffs

NO. LR 68-C-151

Board of Education of North Little Rock, Arkansas, School District, et al. Defendants

ORDER

On September 1, 1978, the entire civil docket in the Eastern District of Arkansas was reassigned in anticipation of the filling of newly created judgeships. The above styled cause was one of several cases assigned to this court's docket at that time. The case, which has over the years dealt with several aspects of the desegregation of the North Little Rock School District, has provided the subject matter for extensive litigation.[1] Yet, despite the protracted nature

[1] As the case number suggests, the jurisdiction of this court has continued in this case for approximately eleven (11) years. The litigation, which was originally styled "Graves v. Board of Education", has produced no less than four published District Court opinions, *Graves v. Board of Education*, 299 F. Supp. 843 (E.D. Ark. 1969); *Graves v. Board of Education*, 302 F.Supp. 136 (E.D. Ark. 1969); *Davis v. Board of Education*, 328 F.Supp. 1197 (E.D. Ark. 1971), modified on appeal, *Davis v. Board of Education*, 449 F.2d 500 (8th Cir. 1971); *Davis v. Board of Education*, 362 F.Supp. 730 (E.D. Ark. 1973).

of the lawsuit, there are three motions which have not been resolved, the plaintiffs' motion for an award of attorney's fees and the defendants' motions to amend findings of fact and for a new trial.[2] This order constitutes the court's final order with respect to the defendants' pending motions. In view of the apparent controversy over the award of attorney's fees to plaintiffs' counsel, the court, regrettably, cannot finally resolve that issue at this time. The court will, however, discuss plans for future proceedings in this case.

After reviewing Judge Shell's Memorandum Opinion of September 13, 1977, the extensive files and papers in this case and the prior decisions which have been rendered in the course of this litigation, we cannot agree with the defendants' assertion that the factual conclusions of Judge Shell, as expressed in his decision of September 13, 1977, are in need of alteration or amendment. In our view, the facts were fully developed in the trial before Judge Shell on April 25-27, 1977. Moreover, in light of the history of this lawsuit, there is little doubt as to the location of the schools in question, the racial composition of the various student attendance zones and schools, the geographic areas from which each school draws its student population and the policies and practices of the Board of Education of the North Little Rock School District with respect to the assignment of students and the availability of transportation for various classes of students at District expense. In addition, if the court were to accept the defendants' invitation to reverse

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[2] The defendants' motions refer to the unpublished Memorandum Opinion of the late Terry L. Shell, United States District Judge for the Eastern and Western Districts of Arkansas. Judge Shell's opinion was rendered on September 13, 1977. The opinion was apparently filed in lieu of separate findings of fact and conclusions of law after a three day trial to the court on April 25-27, 1977. See Rule 52(a) of the Federal Rules of Civil Procedure. We are uncertain whether the plaintiffs' motion for attorney's fees stems from services rendered in connection these particular proceedings only.

the presiding trial judge's findings of fact, we would have to do so without the benefit of the crucial credibility assessments which the presiding judge was in the best position to make. Hence, we are not inclined to disturb the findings of fact of the presiding trial judge.[3] The defendants' motion to amend or alter findings of fact should be and the same is hereby denied.

We find no basis in law or fact for granting a new trial in this case. Accordingly, the defendants' motion for a new trial is denied.

As we have previously indicated, the plaintiffs' motion for an award of attorney's fees cannot be resolved entirely at the present time. One preliminary question can be resolved, however. The court is going to award plaintiffs' counsel a reasonable attorney's fee based on the provisions

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[3] The affidavit of George E. Miller, Superintendent of the North Little Rock School District at the time of the trial before Judge Shell, adequately demonstrates that the court cannot redetermine the facts in this case without completely retrying the case. Mr. Miller's affidavit was attached to the defendants' motion to amend findings of fact and for a new trial filed on September 23, 1977. Mr. Miller's affidavit, at the bottom of the first page and the top of the second page, mentions that Central Arkansas Transit has always provided students living in the Dixie Addition of North Little Rock with bus transportation to Northeast High School and Lakewood Junior High School. This statement is no longer true. It is now a matter of common knowledge, at least as of the date of this order, that Central Arkansas Transit, after well publicized disagreements with North Little Rock City officials, no longer provides any bus service in North Little Rock.

of 42 U.S.C. §1988,[4] more commonly referred to as the National Civil Rights Attorney's Fees Awards Act of 1976. We find, as the presiding trial judge implicitly found, that the plaintiffs were the prevailing parties in the trial conducted before the court on April 25-27, 1977. It cannot be seriously contended that the plaintiffs failed to establish the entitlement of members of their class to transportation at District expense. Nor can it be argued that plaintiffs did not succeed in obtaining implementation of objective employment criteria with regard to hiring, job assignments and promotions within the North Little Rock School District. In fact, about the only issue which the plaintiffs did

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[4] 42 U.S.C. §1988 provides in pertinent part as follows:

> "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§1681 et seq.], or in any civil action by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revneue Code [26 USCS §1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This statute has been applied retroactively to all cases which were pending on the date the statute became effective. *Gay Lib v. University of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977); *Finney v. Hutto*, 548 F.2d 740, 742 (8th Cir. 1977).

In view of the plaintiffs' success on issues dealing with the defendant School District's employment practices and procedures, section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e-5(k) provides an additional basis for an attorney's fee award.

not "prevail" on was their request that the defendants and their attorney be held in contempt.[5]

Having resolved the question of whether plaintiffs' counsel are entitled to an award of attorney's fees one question remains, what is a reasonable fee under the circumstances presented. Since the defendants have contested the fee issue, the court will conduct a hearing for the purpose of developing a record on the factors enunciated by the Court in *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978).[6] The court will conduct the hearing at 9:30 a.m. on July 27, 1979 in Room 419 United States Post Office & Courthouse, Little Rock, Arkansas. At least ten (10) days prior to the date of the hearing plaintiffs' counsel shall submit a *complete* itemization of all time claimed to the court and counsel for the defendants. The court has no intention to address the fee issue in a piecemeal fashion. Any time which is not itemized in the manner prescribed above and addressed at the scheduled hearing will not be considered in the fee award.

The parties are also directed to submit to the court within twenty (20) days of the date of this order a written list of the issues in this case which need to be litigated, if any. If no issues remain, the parties should address the

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[5] It is perhaps misleading to say that the plaintiffs failed to "prevail" on this issue. Judge Shell's Memorandum Opinion reflects, at pages 11 and 12, that the defendants had, in fact, not complied with previous orders from the Court of Appeals. His refusal to hold the defendants and their counsel in contempt was premised on his conclusion that "nothing would be remedied by a contempt citation."

[6] Guidelines on this issue were set out in *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714, 717-19 (5th Cir. 1974) and were approved by the Eighth Circuit in *Doe v. Poelker*, 515 F.2d 541, 548 (8th Cir. 1975), reversed on other grounds, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977).

issue of whether the court should retain jurisdiction in this cause, a statement of the reasons and citations of authority in support of the position taken.

IT IS SO ORDERED THIS 29th DAY OF JUNE, 1979.

/s/Elsijane T. Roy
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Robert J. Davis in his own behalf
and all others similarly situated, Appellees,

v.

Board of Education of the North Little
Rock, Arkansas, School District, a public
body corporate, and F. B. Wright, Superintendent
of Schools of the North Little Rock
School District, Appellants.

No. 79-1640

JUDGMENT

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed in accordance with the opinion of this Court.

It is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the opinion with the District

Court to retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated.

Filed December 24, 1980.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1640 September Term, 1980

Robert J. Davis in his own behalf
and all others similarly situated,

Appellees,

vs.

Appeal from the United
States District Court
for the Eastern District
of Arkansas

Board of Education of the North Little
Rock, Arkansas School District, a
public body corporate and F. B. Wright,
Superintendent of Schools of the North
Little Rock School District,

Appellants.

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 29, 1981

Office-Supreme Court, U.S.
FILED
JUN 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

ROBERT L. DAVIS, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a school desegregation action, the courts below abused their equitable discretion by (a) ordering further relief for faculty and staff recruitment and assignment when they found that relevant provisions of a desegregation plan in fact had not been implemented, and (b) ordering that transportation be provided when they found that the student assignment plan imposed undue transportational burdens on certain black students.

2. Whether a school desegregation action is moot where the courts below permitted black school children and parents to intervene and be substituted for named parties plaintiff who no longer attend schools in the defendant school district.

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No. 80-1831

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, et al.,

Petitioners,

v.

ROBERT L. DAVIS, et al.

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On Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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Statement

This action to desegregate the public school system in North Little Rock, Arkansas, was filed by black students

and parents in August 1968.[1] A desegregation plan which extended to, inter alia, student assignment, and faculty and staff

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1/ The action was brought by Cornell Graves, et al., as a class action pursuant to Rule 23(a) and (b)(2), Fed. R. Civ. Pro. (Complaint). Upon the graduation of original plaintiffs, the Eighth Circuit permitted Robert J. Davis, et al., to intervene as parties plaintiff in order to represent themselves and members of the putative class, and to be substituted for original plaintiffs. Order of February 2, 1971, Davis v. Board of Education of North Little Rock, 8th Cir. No. 20486. On April 22, 1977, the district court permitted substitution of Lorene Joshua, as mother and next friend of her four children, all North Little Rock students, as parties plaintiff in order to represent themselves and members of the potential class after Robert J. Davis, et al., moved from North Little Rock (see, A-15). The same day, the court denied a motion to dismiss for mootness (id.).

The courts below have treated the action as a class action (see, e.g., A-2, A-14), but a class action has never been formally certified.

assignment was ordered implemented in school year 1972-1973. Davis v. Board of Education of North Little Rock, 449 F.2d 500 (8th Cir. 1971) (en banc). The district court retained jurisdiction to oversee implementation of the plan (449 F.2d at 502, A-14).

On April 30, 1975, plaintiffs filed a motion for further relief. A contempt citation was also sought against defendants and their counsel for failure to comply with the 1971 mandate of the Eighth Circuit. A three-day hearing was held on the 1975 motion in April 1977, and the district court issued a memorandum opinion on September 13, 1977 (A-14).

As to faculty and staff, the court ordered the implementation of objective nondiscriminatory recruitment and assign-

ment (A-19 - A-23). In 1969, the district court had rejected a faculty and staff desegregation plan consisting solely of a nondiscriminatory pledge, but failed to order the development of objective standards (id.). In 1971, the Eighth Circuit directed the district court to require the school district to establish and implement such standards. However, the mandate was not enforced until 1977, and the school district continued to use the policies rejected in 1969. The court found faculty and staff policies to be highly subjective and discriminatory, and ordered the development of objective nondiscriminatory standards.[2/]

2/ The court of appeals found that:

> We believe that Judge Shell's findings are more than adequately

With respect to pupil transportation, the motion for further relief sought to reduce the burden of travel on secondary students living in the predominantly black Dixie Addition in the city's southeast section (A-16 - A-18). All black secondary students had attended Jones High School located in the Dixie Addition before desegregation. Under the student assignment portion of the desegregation plan, Jones was converted to a district-wide seventh grade center and black students reassigned to other schools,

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2/ Continued

supported by the record and that his order is an appropriate one which hopefully will ensure a nonracially identifiable faculty and staff at every level of the school system.

(A-6 - A-7).

including Northeast High School and Lakewood Junior High, which share a campus in the extreme northeast section (id.). The court found that "there is no reasonably safe pedestrian pathway from the Dixie Addition area to Northeast High School and Lakewood Junior High," that students living in the Addition assigned to northeast schools do not have access to transportation, and that the desegregation plan "imposes an undue transportational burden upon those black students" (A-18-A-19). The court also found that white secondary students were not subject to such transportational burdens (id.). Plaintiffs requested that either Jones High School be reopened for upper grades or that transportation be provided for students assigned to Northeast and Lake-

wood Junior High living in the Dixie Addition. The court ordered the latter.[3/]

3/ The Court of Appeals found that:

> The record fully supports the district court's findings and conclusions. There is abundant testimony in the record indicating that students living in the Dixie Addition are required to cross a major interstate highway at the busiest time of day to reach North East High School; that there is no safe and convenient way to cross that highway; that students are required to walk on the streets through much of the route between "Dixie" and the high school -- a distance of about two miles. The record also reveals that many of the families that live in the Dixie Addition are low income families who are unable to afford the cost of public transportation to and from school; it further reflects the fact that public transportation is not always convenient or dependable. We also note that the district court was concerned with equalizing the burden of integration as between the black and white students in the school district, and believed that providing transportation to the predominantly black Dixie high school students was one way of

The court pretermitted decision on plaintiffs' assertions that the school district discriminated against black students in assignment to special education and honors classes, imposition of discipline, and participation in extracurricular activities.[4/] The court also

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3/ Continued

> accomplishing this goal. We agree that the goal is a legitimate one and that it will be achieved in part by the district court's order.

(A-4).

4/ The court found that disparities "did not rise to the level of showing systematic discrimination," that "regrettable incidents stemming from racial prejudice" were not within the scope of the lawsuit, and that, "[a]t any rate, some of the matters about which plaintiffs complain have been resolved or are in the process of resolution" (A-24).

The court of appeals found:

> We ... note that the record is replete with evidence that black

"decided that nothing can be served by holding the defendants and defense counsel in contempt" for failing to enforce provisions of the desegregation plan and Eighth Circuit mandate (A-26). Attorney's fees also were awarded (id.).

4/ Continued

students do not participate in proportion to their numbers in certain extracurricular activities including cheerleading, pep club, band, drill team and future homemakers. The record also shows that black students are suspended more frequently than white students and that they tend to be numerically overrepresented in the special education classes for slow learners.

There is a serious dispute in the record regarding the reasons for lack of participation in the listed extracurricular activities, for the more frequent suspensions and overrepresentation in the classes for slow learners. The plaintiffs introduced evidence tending to show that the school district and its administrators were responsible, and that these conditions resulted because of the discriminatory

The school district moved to alter and amend and for a new trial, but the motions were not immediately acted upon because the district judge died. Eventually, the motions were denied June 29, 1979 (A-27).

4/ Continued

> policies of the Board, the school administrators and the faculty. The Board introduced evidence tending to show that nonracial factors were responsible for the conditions. Judge Shell did not explicitly decide these issues. ... While we are not prepared to hold at this time that the district court's rulings in these regards are clearly erroneous or based on an erroneous view of the law, we are satisfied from the record that the situation can be dramatically improved if this Court's earlier mandate, requiring a non racially identifiable faculty and staff at <u>every level</u> of the school system, is promptly implemented. Judge Shell's order, which we affirm today, imposes that requirement on the Board of Education.

(A-7).

On appeal, the Eighth Circuit affirmed without dissent (A-1).

REASONS FOR DENYING THE WRIT

The opinions below raise no important question requiring review, and are consistent with opinions of this Court and the courts of appeals.

1. The North Little Rock school district has never been declared to be a unitary system. No court has taken evidence and determined that the desegregation plan ordered into effect in the 1972-73 school year has worked "'to effectuate a transition to a racially nondiscriminatory school system.'" Columbus Board of Education v. Penick, 443 U.S 449, 458 (1979), quoting Brown v. Board of Education, 349 U.S. 294, 301 (1955). Indeed, five judges below found that, under the desegregation plan as

implemented, faculty and staff were discriminatorily hired and assigned, and black students were subjected to disproportionate transportational burdens. Nor is it disputed that the school district failed to comply with specific court orders requiring objective nondiscriminatory selection and assignment of faculty and staff, prior approval of school construction and regular reporting implementation. Faculty and staff integration, e.g., Columbus Board of Education v. Penick, supra, 443 U.S at 460; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971); United States v. Montgomery County Board of Education, 395 U.S. 225 (1969), and transportational burdens, e.g., Swann, supra, 402 U.S. at 26-27, 30-31; Keyes v. School District No 1, 413 U.S. 189, 241 (1973) (Powell, J., concurring and dissenting in part),

are recognized critical components of an effective desegregation plan. The record, in short, demonstrates that significant elements of the remedy were not implemented.

Plainly, the courts below were well within the "breadth and flexibility ... inherent in equitable remedies," Swann, supra, 402 U.S at 15, in "consider[ing] problems related to administration, ... the school transportation system [and] personnel," Brown, supra, 349 U.S. at 300. Indeed, it was their duty. Green v. County School Board, 391 U.S. 430, 439 (1968).5/

5/ Nor are the opinions below contrary to this Court's opinion in Pasadena City Board of Education v. Spangler, 427 U.S 424 (1976), in which the student assignment part of a desegregation plan had been complied with, prior unconstitutional assignment practices cured, and racial

2. Nor did the lower court abuse its discretion in granting the motion of black students and parent to intervene or to be substituted as parties plaintiff

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concentrations resulted from intervening demographic changes. No such findings were made about any facet of the 1972-73 plan. Indeed, this is a case in which the operative facts in Spangler are precisely contrary: provisions of a plan were not implemented. Nor is there any purported split between the Fifth Circuit and other circuits concerning achievement of unitary status. See, Petition pp. 8-9. The law in the Fifth Circuit, as in the other circuits, is that "[t]he critical issue ... is whether a unitary system has been achieved at any time subsequent to the imposition of the desegregation order," United States v. Board of Education of Valdosta, Georgia, 576 F.2d 37, 38 (5th Cir.), cert. denied, 439 U.S. 1007 (1978), not some arbitrary period of time following an order. Whether a school district is unitary is a determination properly made on a case-by-case basis. See, e.g., Martin v. Charlotte-Mecklenburg Board of Education, 475 F. Supp. 1318 (W.D. N.C. 1979), aff'd on other grounds, 626 F.2d 1165 (4th Cir. 1980), cert. denied, 49 U.S.L.W. 3743 (1981).

and representatives of the putative class. See, Rogers v. Paul, 382 U.S. 198, 199 (1968). Plaintiff students' standing to challenge undue transportational burdens resulting from an assignment plan is unquestioned, and their standing to challenge such practices as faculty and staff assignment has long been settled. Rogers v. Paul, supra, 382 U.S at 200.

Unlike Spangler, supra, 427 U.S. at 430, there are named parties with a present interest in the controversy: the issue is not mootness, but whether the requirements of Rule 23, Fed. R. Civ. Pro., are met. The proper forum to test whether plaintiffs are able to prosecute the action as a class action is the trial

court not an appellate court.[6/]

Furthermore, the claims asserted are not somehow stale. The North Little Rock school district "has been under a continuous constitutional obligation to disestablish its dual school system." Penick, supra, 443 U.S at 458. Petitioners' failure to do so is a continuing violation of law.

3. The district court's order that transportation should be provided by the district to students living in Dixie Addition assigned to northeast sector secondary schols is correct. The order was concurred in by another judge on reconsideration and by three other judges on appeal. The order is well within the remedial equitable discretion of the

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6/ Upon issuance of the mandate, plaintiffs intend to move immediately for class certification in the district court.

courts, and the underlying factual findings are well supported and not clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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